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**United States Department of Transportation
Federal Railroad Administration**

DEPT. OF TRANSPORTATION
FRA-1999-6135-5

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Docket No. FRA-1999-6135-5

**Response of International Brotherhood of Locomotive Engineers to
Petition of New Jersey Transit Corporation
For Approval of Shared Use and
Waiver of Certain Federal Railroad Administration
Regulations Pursuant to 49 CFR §211.7**

These comments are submitted in response to the Petition of New Jersey Transit Corporation ("NJT") for Approval of Shared Use and Waiver of Certain Federal Railroad Administration ("FRA") Regulations Pursuant to 49 CFR §211.7 ("Petition"), with respect to proposed light rail service on Consolidated Rail Corporation's ("Conrail") Bordentown Secondary Track. The International Brotherhood of Locomotive Engineers ("BLE") is the collective bargaining representative for locomotive engineers employed by every Class I railroad in the United States, and nearly every other railroad in the nation where a collective bargaining representative is certified. More specifically, BLE represents locomotive engineers employed by both Conrail and NJT.

The work performed by BLE's 30,000 locomotive engineer members in the United States is the most closely regulated in the railroad industry, and locomotive engineers are among the highest regulated of all American workers.' Consequently, BLE and its members have a unique perspective on and an abiding interest in the NJT Petition.

At the outset, BLE wholeheartedly concurs with FRA's statement, expressed in its May 24, 1999, Proposed Joint Policy Statement ("Policy Statement") with the Federal Transit Administration ("FTA") that "the expansion of rail transit systems operating over portions of conventional railroad trackage poses major safety issues that must be addressed if such service is to be provided within a suitably safe transportation environment . . . [because a] collision between

¹ See, e.g., 49 CFR Parts 209, 214-22, 223, 225, 228-229, 231-234, 236 and 239-240.

a light rail ‘transit vehicle with passengers aboard and heavy-duty freight or passenger equipment would likely result in catastrophe.’ 64 **FR 28239**.

The Policy Statement confirms that FRA will retain its statutory authority to take necessary and appropriate emergency action on parts of the general railroad system over which light rail service operates, as it must. FRA also intends to reserve the enforcement powers delineated in 49 CFR Parts 209 and 216 “in all cases.” **Id., at 28241**. As might be expected, those FRA rules that pertain to the physical infrastructure² also will remain in full force and effect. **Id., at 28241-42**.

Further, with one significant exception, FRA rules that govern employees whose duties are related either to infrastructure or to operations also will continue to apply. Roadway Worker Safety provisions encompassed in Part 214 will be maintained. **Id., at 28242**. Control of alcohol and drug use by employees in safety-sensitive positions will continue to be in accordance with federal rules.³ The same is true with respect to accident reporting and investigation.⁴ **Id.**

However, the Policy Statement left a gaping hole by contemplating a mixture of federal and state oversight of those who will operate the light rail vehicles. Specifically, FRA has indicated that waivers will likely be granted with respect to the application of Parts 228 and 240 for light rail vehicle operators. BLE is convinced that this question must be revisited if the safety issues identified by FRA and FTA are to be adequately addressed, and has filed comments setting forth its position. Before responding directly to NJT’s Petition, we will reiterate our position herein.

² 49 CFR Parts 213, 218, 220, 228 and 233-236.

³ FRA and FTA propose that 49 CFR Part 219 will apply to the extent that FTA rules do not govern. This is a distinction without a difference, as there is uniformity in the requirements across all modes regulated by DOT. See, e.g., 49 CFR Part 40.

⁴ Employee injury reports would be made in accordance with federal rules promulgated by either FTA or OSHA, rather than FRA; state rules will not apply.

The hybrid method contemplated by the Policy statement will impede development of light rail systems, and will be difficult to enforce. Even worse, such a method may cause evasion of FRA's regulatory intent, as currently existing commuter railroads would be tempted to replace their **current** fleet with light rail equipment, as a means of exempting themselves from the full range of FRA regulations.

FRA's retention of rules pertaining to track safety, roadway worker, and signal and train control standards will require that light rail vehicle operators be proficient in the federal standards, as well as the host railroad's operating rules and procedures that govern all of these subjects? The same is true for alcohol and drug control, radio communications and accident reporting regulations.

It seems illogical to BLE that light rail vehicle operators should be relieved from compliance with FRA's Hours of Service timekeeping requirements, found at 49 CFR Part 228, while employees performing dispatching and signal maintenance, on the very infrastructure over which the light rail service is provided, continue to be regulated. In fact, FRA appears to concede the difficulty this artificial distinction creates, because it recognizes that a **statutory** waiver from the mandates of the Hours of Service Act, 49 USC Ch. 211, would be required. See Policy Statement at n.2.

That: development of railroad industry technology, combined with a reduction in crew size driven by technological change, has mechanized most of the safety-related redundancy that the industry's evolution had placed in human hands for a century and a half. Consequently, the

⁵ Specifically, FRA and FTA state that

“[l]ight rail employees will be entitled to appropriate protections during shared-use operations. In addition, the light rail operators will need to observe rules designed to protect employees of other organizations who may be working along the right-of-way.”

significance of the human factor in railroad safety has moved to center stage. In direct response to this phenomenon, which was triggered by the 1986 Chase, Maryland tragedy, the public policy has been to move the industry in the direction of standardization, rather than the maze created by hybridization.

For example, the statutory underpinning for FRA's engineer certification rule is Section 4 of the Rail Safety Improvement Act of 1988 ("RSIA"), P.L. 100-342. RSIA imposed strict requirements on the railroad industry, including: 1) FRA review and approval of each carrier's standards; 2) minimum training requirements; 3) comprehensive knowledge by locomotive engineers of applicable operating rules and practices; 4) consideration of the motor vehicle driving records of each locomotive engineer, with particular focus on driver license denials, cancellations, revocations or suspensions due to alcohol or illicit drug convictions; and 5) disqualification or conditioning of a locomotive engineer's certification on the basis of state action against a motor vehicle operator's license! 49 USC §20135(b).

FR4 published its Notice of Proposed Rulemaking concerning locomotive engineer certification in 1989, and the Final Rule was promulgated in 1991. 54 FR 50890; 56 FR 28228. The regulation was amended twice, with the publication of Interim Final Rules in 1993 and 1995. 58 FR 18982; 60 FR 53133. Finally, the regulation is scheduled for an overhaul in the coming months, as the result of a second Notice of Proposed Rulemaking, following a 21-month review by a working group comprised of FRA officials and rail industry and labor representatives. 63 FR 50625.

⁶ For its part, the industry has voluntarily moved toward greater operating rules standardization. The two most significant developments in this area are the nearly 40-member Northeast Operating Rules Advisory Committee ("NORAC"), which has promulgated a single set of operating rules in the Northeastern United States, and further codification of operating rules among Western railroads in the General Code of Operating Rules ("GCOR").

The regulatory scheme maintained by FRA for those who operate locomotives on America's railroads is broad in scope and detailed in its requirements. It applies to the entire general railroad system of transportation, except on rapid transit operations in an urban area that are not connected with the general system, and on railroads that operate **only** on track inside an **installation** which is not part of the general system. **49 CFR §240.3(b)**. Part 240 enhances safety by providing standardization with respect to the following areas:

- criteria for selection of designated supervisors of locomotive engineers and for designation of classes of service (**49 CFR §§240.105-.107**);
- criteria for eligibility and consideration of data in determining eligibility for certification based on prior safety conduct and rules compliance, both in the railroad industry and as a motor vehicle operator, including data on substance abuse disorders and alcohol/drug rules compliance (**49 CFR §§240.109-.119, .205**);
- standards for vision and hearing acuity, initial and continuing education (including knowledge testing), examining skill performance and monitoring operational performance; (**49 CFR §§240.121-.129, .207-.211, .303**);
- standardized procedures for reliance on qualification determinations made by other railroads, qualification requirements of other countries, and requirements for joint operations territory (**49 CFR §§240.225-.229**); and
- standardized procedures for imposing civil liability for prohibited conduct by certified engineers, as well as procedures for revocation of certification, with an appellate process administered by FRA (**49 CFR §§240.305-.307, .401-.411**).

BLE has been at the forefront of a continuing effort to improve FRA's certification rule, and substantial BLE resources have been devoted to this work for more than a decade. While much of BLE's focus has been on how the rule impacts locomotive engineers suspected of or found **culpable** for violating certain "cardinal" operating rules, we are convinced that, on balance, the standardization fostered by Part 240 has demonstrably enhanced safety in the railroad industry. In our view, human factor accidents in the railroad industry have been markedly reduced as a direct result of standardization.

It is with this in mind that BLE has evaluated the Policy Statement, and believes it marks a dangerous retreat from the progress of the past decade as to the operators of light rail equipment. While there may be a certain, superficial appeal to the notion that light rail vehicles do not present the same degree of operational sophistication as traditional railroad equipment, this concept overlooks several important factors.

First, there is a long history of treating non-conventional passenger rail equipment as any other rail equipment, albeit with appropriately tailored special regulations where necessary. Light weight rail diesel cars (RDC) and multiple unit electric cars (MU) have been in use for decades, with no exemptions from applicable FRA rules for locomotive engineers who operate that equipment. The equipment used on the Port Authority Trans-Hudson (“PATH”) railroad more resembles rapid transit equipment than traditional passenger railroad equipment. Nonetheless, FRA has found it appropriate to apply the full panoply of FRA regulations pertaining to locomotive engineers operating that equipment, and this ruling has been judicially upheld.⁷

Second, FRA would abdicate its ability to adequately ensure safety. The Policy Statement declares that

“[t]he most important safety issue related to shared use of the general railroad system is the potential for a catastrophic collision between conventional rail equipment and rail transit equipment of lighter weight. Because of the significantly greater mass and structural strength of conventional equipment, the two types of equipment are simply not designed to be operated in a setting where there is any appreciable risk of their colliding.”

64 FR 28239.

⁷ PATH sought its exemption on August 9, 1996, which was denied by FRA on December 24, 1996, with a final agency determination issued on February 21, 1997. On February 24, 1997, PATH filed a Petition for Review in the U.S. Court of Appeals for the D.C. Circuit, which Court affirmed the Agency’s determination. PATH subsequently filed a petition for a writ of certiorari with the United States Supreme Court (Case No. 97-1922), which was denied on October 5, 1998.

FRA concedes, and properly so, that “the greater the safety risks inherent in a proposed operation the greater will be the mitigation measures required [in order to secure a waiver from FRA].” ***Id.***, at 28240. Accordingly, consideration must be given the severity of an accident associated with a derailment and overturning of a light rail vehicle. Under-qualified light rail vehicle operators are more likely to become involved in such an accident, particularly when maintenance of a time schedule is emphasized. Therefore, waiver for light rail vehicle operators from the industry standard qualification and certification requirements outlined in Part 240 flies in the face of the standard articulated in the Policy Statement.

Third, light rail operations on the general railroad system hold great promise. Moreover, implicit in the Policy Statement is the prospect for development of systems that would not be absolutely separated in space and time from very low density freight operations.’ The economic viability of such initiatives is intimately bound up with the ability to forecast operating requirements within a reasonable degree of certainty.

For these reasons, BLE believes it would be a mistake to put light rail systems in a position where their natural evolution and maturation could be stunted because their operation had grown in size or complexity to a point where a waiver from compliance with Part 240 could no longer be justified. BLE also believes the proposed waiver would create a logistical nightmare for FRA, which would be unreasonably limited in exercising authority over a constantly expanding plethora of state safety oversight schemes only under emergency conditions. Safety and consistency demand continued federal preemption in the area of training, qualification and certification

⁸ In fact, this Petition envisions eventual commingled service. The Letter of Intent between NJT and Conrail for the purchase of the BST provides, in pertinent part, that

“NJ TRANSIT recognizes and agrees to bear the entire cost of all capital improvements or other upgrades needed on the BST that will facilitate the safe commingling or (sic) simultaneous freight and passenger operations on the BST. At such time, Conrail will be granted the ability to operate on the BST on a 24 hr/day basis.”

Exhibit “C”, at ¶11.

of **all** transportation employees who operate on the general system.

In short, the operating environment in which light rail vehicle operators find themselves, rather than the type of equipment they operate, must dictate what degree of FRA oversight is appropriate. The Policy Statement understands this imperative, because it acknowledges that light rail vehicle operators will need to be proficient in general railroad system rules pertaining to track safety, roadway worker, and signal and train control standards. Furthermore, light rail vehicle operators will fall under federal regulations governing alcohol and drug control, radio communications and accident reporting.

They also will be subject to the federal Hours of Service Act, absent a statutory waiver. Under these circumstances, BLE believes that application of Part 240, *in toto*, to light rail vehicle operators is not only warranted, but is indispensable, if light rail service is to meet the “intention of FTA and FRA to maintain the level of safety typical of conventional rail passenger operations” **Id.**, at 28240. Accordingly, BLE has strongly urged FRA and FTA to adopt a policy to require application of 49 CFR Part 240 to all light rail vehicle operators.

NJT plans to conduct operations over the BST in standard railroad fashion, as evidenced by the following:

- The signal system to be installed will be FRA-compliant. **Petition** at pp. 9, 26-27.
- FRA-compliant grade crossing protection will be afforded. **Id.**, at p. 32.
- Operations will be governed by the NORAC Operating Rules. **Id.**, at pp. 10-11.

NJT also plans sophisticated collision avoidance systems and the BST has approximately four dozen grade crossings, and a railroad crossing at grade with Conrail that will be operational twenty-fours a day. Moreover, NJT has prepared for a contingency whereby light rail and freight service would be commingled in an emergency (e.g., a failure of the Delair Bridge) even at the

outset of operations, and intends the eventual introduction of regular commingled service. **See**, **e.g.**, **NJT Exhibit “C” at ¶¶ 5, 8, 11.**

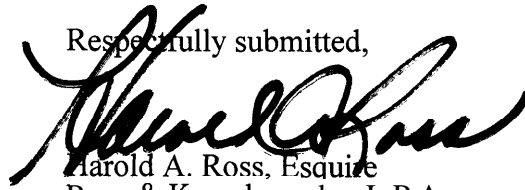
BLE believes that NJT does not seek waivers from compliance with Part 228 and/or Part 240 for its light rail vehicle operators. We note that NJT intends to comply with all FRA regulations from which a waiver has not been specifically sought. **Id.**, **at p. 22.** Thus, it would appear unnecessary for BLE to file this response.

However, NJT’s Exhibit “D” - its bid document for the System Safety Program Plan (“SSPP”) to be applied on the BST - is so vague as to make unclear NJT’s intent insofar as its intent to comply with Parts 228 and 240 is concerned. Two specific portions of the SSPP are the cause of BLE’s concern. The first is a generic reference to “operating rules/procedures,” rather than the NORAC Operating Rules. **Exhibit “D” at p. 17.** The other is the fact that the language concerning the employee safety program makes absolutely no reference to FRA regulations. **Id.**, **at pp. 21, 26-28.**

Admittedly, the SSPP bid was prepared in the first quarter of 1998, before FRA, FTA or anyone in the regulated community had stated a position on these issues. It may be that the SSPP simply was not revised to correspond to the representations contained in NJT’s Petition. If so, then this response is nothing more than an invitation to NJT to clarify that it does not seek waivers from - and will comply with - Parts 228 and 240.

However, if NJT believes that no specific waiver from compliance with Parts 228 and/or 240 is required, based on the stated intentions of FRA in the Policy Statement - not an unreasonable inference when the SSPP language cited above is considered - then BLE must strongly object, for the reasons stated herein.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Harold A. Ross". The signature is fluid and cursive, with a large, sweeping "H" and "R".

Harold A. Ross, Esquire
Ross & Kraushaar do., L.P.A.
1548 Standard Building
1370 Ontario Street
Cleveland, Ohio 44 113
(216) 861-1313
Attorney for International
Brotherhood of Locomotive Engineers

Date: November 5, 1999

CERTIFICATION OF SERVICE

The undersigned verifies that a copy of Response of International Brotherhood of Locomotive Engineers to Petition of New Jersey Transit Corporation For Approval of Shared Use and Waiver of Certain Federal Railroad Administration Regulations Pursuant to 49 CFR §211.7 was served upon all parties identified below on November 5, 1999, via first-class mail, postage prepaid.

Mr. Dan Censuello
Senior Director, New Rail Construction
New Jersey Transit
One Penn Plaza East
Newark, NJ 07 105-2246


Harold A. Ross, Esquire

Date: November 5, 1999